Sean O'Casey Patterson v Chan Hoong Poh & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–65 OF 2008 W-01–66 OF 2008
AZHAR MA'AH, TENGKU BAHARUDIN SHAH AND WAN ADNAN MUHAMAD JJCA
30 MARCH 2010

Family Law — Children — Adoption — Muslims — Registration of Adoptions Act 1952 to be interpreted independently of Adoption Act 1952 — Whether Registration of Adoptions Act 1952 applicable to Muslims

Family Law — Children — Adoption — Registration of adoption — Whether registration of adoption valid — Whether requirements for adoption under the Registration of Adoptions Act 1952 satisfied — Whether registration to be set aside — Whether discretion of registrar properly exercised — Whether fit and proper case to dislodge child from adopters

Family Law — Children — Legitimacy — Application by biological father to insert his name in child's birth certificate — Mother of child legally married to another man when child was conceived

The appellant (an American citizen) claimed that he and the first respondent were married in 1998 in Las Vegas. The first respondent later gave birth to the appellant's son on 21 March 2000 in Kuala Lumpur. The son was named Jordan Ter Wei ('Jordan'). The appellant claimed that thereafter he made numerous trips to Malaysia to visit the first respondent and Jordan and gave them money. The appellant later came to know that Jordan's birth certificate stated the name of one Bart Van Hoek ('Bart') as the father. The first respondent had had a previous relationship with Bart. The DNA profiling test showed that the appellant was the biological father of Jordan. In the circumstances, the appellant went to the Jabatan Pendaftaran Negara to rectify the father's name in Jordan's birth certificate. There the appellant discovered that the second respondent (sister of the first respondent) and the third respondent (the second respondent's husband) had on 18 February 2004 adopted Jordan under the Registration of Adoption Act 1952 ('Act 253'). The second and third respondents being Muslims had also converted Jordan who now went by the name of Eusof Jordan Nik Ahmad. The appellant therefore filed an originating summons in the High Court praying, inter alia, for the following orders: (a) a declaration that the appellant was the biological father of Jordan; (b) that the register be rectified to name the

appellant as Jordan's father in the birth certificate; (c) that Jordan's name be changed to Jordan O'Casey Patterson; (d) a declaration that Jordan's adoption by the second and third respondents was null and void and as such be set aside; (e) that the appellant be granted sole and exclusive guardianship, custody, care and control of Jordan; (f) a declaration that the conversion of Jordan into the Islam religion was null and void; and (g) that Jordan be delivered to the appellant immediately. The appellant claimed that Jordan's adoption was invalid on the grounds that Act 253 is not applicable to Muslims; lack of consent by biological parents and conditions under s 6 of Act 253 had not been fulfilled. The High Court granted a declaration that the appellant was the biological father of Jordan and ordered the register be rectified to name the appellant as Jordan's father in the birth certificate. The other prayers were dismissed. Hence this appeal.

Held, dismissing the appeal:

(1) The trial judge was right in holding that the appellant was the biological father of Jordan. However, the learned judge erred in ordering the register to be rectified to name the appellant as Jordan's father in the birth certificate. At the time when the appellant and the first respondent went through the purported marriage ceremony in Las Vegas, the first respondent was still in marriage with one John Kung. This being the case, the purported marriage ran counter the provision of s 5 of the Law Reform (Marriage and Divorce) Act 1976 (see paras 8–9).

(2) Act 253 also applies to Muslims. The fact that Act 253 and the Adoption Act 1952 ('Act 257') were passed at about the same time in 1952 with only Act 257 providing for the exclusion of Muslims reflected the true intention of the Legislature not to bar the application of Act 253 to Muslims. The two legislations must be read independently; *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 overruled (see paras 14–15).

(3) The original birth certificate of Jordan stated Bart as the father. This fact was also found in the Permohonan Pendaftaran Pengangkatan. The Surat Keizinan Pengangkatan stated that Bart could not be contacted. Based on these information that the fourth and fifth respondents processed and approved the application for registration of the adoption. The registrar in approving the registration of the adoption had exercised his discretion appropriately. In the absence of any evidence to the contrary, the registrar is expected to accept and receive evidence of any witnesses supporting such application as statement of truth and thus becomes duty bound to register an adoption (see paras 18 & 20).

(4) Jordan had been in the custody and care of the second and third respondents since the year 2000, not long after he was born. The first respondent was seeing less and less of him. The second and third

respondents were in good position to provide well for the child. The child who was about ten years of age was comfortably lodged in the custody and care of his aunt (the second respondent) and her husband. It would not be in the best interest and welfare of the child to dislodge him and place him in the care and custody of the appellant who was virtually a stranger to him (see para 22).

[Bahasa Malaysia summary

Perayu (warganegara Amerika) mendakwa bahawa dia dan reponden pertama telah berkahwin pada tahun 1998 di Las Vegas. Responden pertama kemudiannya melahirkan anak lelaki perayu pada 21 Mac 2000 di Kuala Lumpur. Anak lelaki tersebut dinamakan Jordan Ter Wei ('Jordan'). Perayu mendakwa bahawa setelah itu, dia selalu berulang alik ke Malaysia untuk melawat responden pertama dan Jordan dan memberi wang kepada mereka. Perayu kemudiannya mendapat tahu bahawa sijil kelahiran Jordan menyatakan Bart Van Hoek ('Bart') sebagai bapanya. Responden pertama mempunyai hubungan dengan Bart pada masa dahulu. Ujian profil DNA menunjukkan bahawa perayu merupakan bapa kandung Jordan. Dalam keadaan ini, perayu pergi ke Jabatan Pendaftaran Negara untuk memperbetulkan nama bapa dalam sijil kelahiran Jordan. Di sana, perayu mendapati bahawa responden kedua (kakak responden pertama) dan responden ketiga (suami responden kedua) telah mengambil Jordan sebagai anak angkat di bawah Akta Pendaftaran Pengangkatan 1952 ('Akta 253'). Responden kedua dan ketiga yang merupakan Muslim juga telah menukar agama Jordan dan kini diberi nama Eusof Jordan Nik Ahmad. Perayu kemudiannya memfailkan saman pemula di Mahkamah Tinggi memohon, antara lain, perintah-perintah berikut: (a) suatu perisytiharan bahawa perayu adalah bapa kandung Jordan; (b) bahawa buku daftar diperbetulkan kepada nama perayu sebagai bapa Jordan dalam sijil kelahirannya; (c) bahawa nama Jordan ditukar kepada Jordan O'Casey Patterson; (d) suatu perisytiharan bahawa pengangkatan Jordan oleh responden kedua dan ketiga batal dan tak sah dan oleh itu harus diketepikan; (e) bahawa perayu diberikan hak penjagaan, jagaan, pemeliharaan dan kawalan mutlak dan tunggal ke atas Jordan; (f) suatu perisytiharan bahawa penukaran agama Jordan kepada Islam adalah batal dan tak sah; dan (g) bahawa Jordan diserahkan kepada perayu segera. Perayu mendakwa bahawa pengangkatan Jordan adalah tidak sah atas dasar bahawa Akta 253 tidak terpakai kepada Muslim; ketiadaan persetujuan oleh ibu bapa kandung dan syarat-syarat di bawah s 6 Akta 253 tidak dipenuhi. Mahkamah Tinggi memberikan suatu perisytiharan bahawa perayu merupakan bapa kandung Jordan dan memerintahkan buku daftar diperbetulkan kepada nama perayu sebagai bapa Jordan dalam sijil kelahirannya. Permohonan-permohonan lain ditolak. Justeru rayuan ini.

Diputuskan, menolak rayuan:

(1) Hakim mahkamah bicara memutuskan dengan tepat bahawa perayu

adalah bapa kandung Jordan. Tetapi, hakim yang bijaksana telah khilaf apabila memerintahkan buku daftar diperbetulkan untuk menamakan perayu sebagai bapa kandung Jordan dalam sijil kelahirannya. Ketika perayu dan responden pertama berkahwin di Las Vegas, responden pertama masih lagi berkahwin dengan John Kung. Maka, perkahwinan yang dikatakan itu berlawanan dengan s 5 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 (lihat perenggan 8–9).

(2) Akta 253 juga terpakai kepada Muslim. Fakta bahawa Akta 253 dan Akta Pengangkatan 1952 ('Akta 257') diluluskan pada masa yang sama dalam tahun 1952 dengan hanya Akta 257 memperuntukkan pengecualian kepada Muslim mencerminkan niat sebenar Perundangan untuk tidak menghalang penggunaan Akta 253 kepada Muslim. Kedua-dua undang-undang tersebut harus dibaca berasingan; *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 ditolak (lihat perenggan 14–15).

(3) Sijil kelahiran asal Jordan menyatakan Bart sebagai bapanya. Fakta ini juga didapati dalam Permohonan Pendaftaran Pengangkatan. Surat Keizinan Pengangkatan menyatakan bahawa Bart tidak boleh dihubungi. Berdasarkan maklumat tersebut responden keempat dan kelima telah memproses dan meluluskan permohonan pendaftaran pengangkatan tersebut. Pendaftar, dalam meluluskan pendaftaran pengangkatan tersebut telah melaksanakan budi bicaranya dengan sesuai. Dalam ketiadaan keterangan sebaliknya, pendaftar dijangka untuk menerima dan menyokong keterangan mana-mana saksi yang menyokong permohonan tersebut sebagai pernyataan sebenar dan oleh itu berkewajipan mendaftarkan pengangkatan tersebut (lihat perenggan 18 & 20).

(4) Jordan berada dalam jagaan dan pemeliharaan responden kedua dan ketiga sejak 2000 lagi, sejurus selepas dia dilahirkan. Responden pertama semakin hari semakin kurang menjenguknya. Responden kedua dan ketiga mempunyai kedudukan kewangan yang baik untuk menjaga anak itu. Anak tersebut yang kini berumur kira-kira sepuluh tahun selesa tinggal bersama mak ciknya (responden kedua) dan suaminya. Bukan dalam kepentingan dan kebajikan terbaik anak itu untuk memindahkannya dan meletakkannya dalam pemeliharaan dan jagaan perayu yang merupakan orang asing bagi anak itu (lihat perenggan 22).]

Notes

For cases on adoption, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2956–2976.

For cases on legitimacy, see 7 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3142–3147.

Cases referred to

Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors [1999] 5 MLJ 618; [1999] 3 CLJ 539, HC (overd)
Arumugam s/o Seenivasagam v Sinnamah (f) [1959] MLJ 130, HC (refd)
McGrath, In Re [1893] 1 Ch 143, CA (refd)

Legislation referred to

Adoption Act 1952 ss 9, 31
Law Reform (Marriage and Divorce) Act 1976 ss 5, 6
Registration of Adoption Act 1952 ss 6, 6(1)(b), 8, 10(4)

Appeal from: Originating Summons No S8–24–2813 of 2005 (High Court, Kuala Lumpur)

YN Foo (Sharmini with her) (YN Foo & Partners) for the appellant.
Sharmini Jayas (Joyan & Associates) for the first respondent.
S Ravichandran (CY Ng with him) (Seah Balan Ravi & Co) for the second and third respondents.
Amir bin Nasruddin (Zarifah bt Zulghaffar with him) (Legal Advisor, Home Affairs Ministry) for the fourth and fifth respondents.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] At the High Court below the applicant/appellant Sean O'Casey Patterson applied for the following orders:

(a) a declaration that the plaintiff Sean O'Casey Patterson is the biological father of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad;

(b) that the fourth and/or fifth defendant amend/rectify the register so that the plaintiff, Sean O'Casey Patterson be named as the father of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad in the Birth Certificate No 000321–14–0363/AQ 53834;

(c) that the fourth defendant amend and/or rectify the register so the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad be named Jordan O'Casey Patterson instead;

(d) a declaration that the adoption of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad by the second and third defendants is null and void and invalid and such adoption be set aside;

(e) a declaration that the registration of adoption of child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad by the second and third defendant is null and void and invalid and such registration of adoption be set aside;

(f) that the fourth and/or fifth defendant annul and/or cancel the registration of adoption of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad;

(g) that the plaintiff above named, Sean O'Casey Patterson be granted sole and exclusive guardianship, custody, care and control of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad;

(h) a declaration that the conversion of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad into the Islam religion is null and void;

(i) that the second and third defendants any/or such other person or persons having custody and/or possession and/or control of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad do deliver the said child to the plaintiff immediately;

(j) that the plaintiff be at liberty all times to reside out of the jurisdiction of Malaysia with Jordan O'Casey Patterson (the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad);

(k) no order as to costs; and

(l) any further or other relief deemed fit by this honourable court.

[2] The learned judicial commissioner after hearing the parties allowed prayers (a) and (b) only and dismissed the rest of the prayers. Hence, this appeal.

[3] The material fact for the purpose of this appeal may be stated as follows.

[4] The appellant, an American citizen, first met the first respondent in 1998 and they started dating in March 1999. In April the same year they got married at the Little Church of the West Wedding Chapel, Las Vegas. The first respondent does not deny the event took place but contends that the ceremony was merely 'an exchange of love in an informal setting'. Thus she denies the existence of any marriage between her and the appellant for the reason aforesaid.

[5] As a result of the relationship between them, the first respondent on 21 March 2000 gave birth to a baby boy whom she named Jordan Ter Wei ('Jordan'), at the Pantai Hospital, Kuala Lumpur. The appellant came to

Malaysia in April 2000 to see the baby and for his christening ceremony. Thereafter, for the period between 2001–2004, according to the appellant he made numerous trips to Malaysia to visit the first respondent and Jordan. According to the appellant their initial plan was for the first respondent to come with Jordan to the United States to join the appellant and set a home there. The said plan did not materialise as the first respondent was reluctant to return to the United States. Despite not keeping to this plan, the appellant, according to him, had always made sure that money was sent to the first respondent to be used for herself and Jordan. Then, upon realising that there was no prospect of the first respondent and Jordan ever coming to settle down in the United States, the appellant was compelled to retain the services of counsel to protect his and his child's rights and put in place a more structured maintenance arrangement for the child. At the same time the appellant was also concerned about the status of Jordan's birth certificate, a copy of which was given to him presumably by the first respondent which he suspected to have been falsified. The suspicion arose as a result of the appellant's coincidental meeting with one Bart Van Hoek with whom it was discovered that the first respondent had a previous relationship. It was found out that the said gentleman was in possession of Jordan's original birth certificate. It was also discovered by the appellant that the said Bart Van Hoek was named as the biological father of Jordan in the original birth certificate. Following that, the appellant decided to do DNA profiling test. Two tests were done and both results showed that the appellant was the biological father of Jordan. Following this, the appellant, sometime in 2005 decided to go to Jabatan Pendaftaran Negara to rectify the child's birth certificate so that he would be named as Jordan's father. There he discovered that the second respondent, Firdaus Chan bt Abdullah, who is the sister of the first respondent, and her husband, the third respondent, had on 18 February 2004 adopted the said child under the Registration of Adoption Act 1952. The second and third respondents being Muslims had also converted Jordan who now goes by the name of Eusof Jordan Nik Ahmad. Following the above mentioned discovery, the appellant subsequently filed an originating summons in the Kuala Lumpur High Court praying for orders as aforesaid.

[6] For clarity and better understanding of this appeal it would be convenient at this juncture to further state that there was a concurrent proceeding before the same judge of the High Court commenced by the first respondent vide summons in chambers wherein the first respondent sought, inter alia, the following orders:

(a) a declaration that the adoption of the child previously known as Jordan Ter Wei and now known as Eusof Jordan Nik Ahmad by the second and third defendants is null and void and invalid and is hereby set aside;

(b) a declaration that the registration of adoption of the child ... is null and void and invalid and is hereby set aside;

(c) the fourth and fifth defendants hereby annul and rescind the registration of the child ... A

(d) the fourth and fifth defendants hereby make the necessary amendments/rectification to the register so the child previously known as Jordan Ter Wei and now known as Eusof Jordan Nik Ahmad be named Jordan O'Casey Patterson; B

(e) the first defendant is granted custody, care and control of the child ...

(f) the child ... delivered and returned to the first defendant immediately;

(g) a declaration that the conversion of the child into the Islam religion is null and void. C

[7] By consent of the parties, both the appellant's and the first respondent's applications were heard together for obvious reason ie that they emanate from the same set of facts. Although the outcome of the first respondent's application is of no significance to the present appeal, for completeness it is stated here that the said application was dismissed by the learned trial judge. D

THE APPEAL E

[8] With regard to the first prayer in the appellant's application, based on the result of the DNA test done on the appellant (exh P32) and also the admission by the first respondent the biological mother of Jordan, that the appellant is the child's biological father, the learned trial judge had no F difficulty in arriving at a finding of facts that the appellant is the biological father of Jordan. Hence, the order as per the appellant's first prayer. On our part we find no reason to disagree with the trial judge. However, we are not with the trial judge in respect of the second prayer which she had granted in favour of the appellant. This issue has to be dealt together with the other G prayers in the appellant's application. It is submitted for the appellant that as the biological father to Jordan the appellant's rights over the child should supercede all other third party claim, and thus the appellant has absolute rights to custody of his child, unless he has forfeited it by certain sorts of misconduct. In support of this proposition, a decision in *Arumugam s/o Seenivasagam v Sinnamah (f)* [1959] MLJ 130 was referred to. Apparently H what was stated in that case was the position at common law. We find no reason to disagree with that. However, it is to be remembered that over the years certain statutes have been passed which did limit to some extent the rights of the parent, though not guilty of misconduct that would disentitled I him or her to the custody of the child at common law.

[9] A pertinent point that emerged from the background of this case is an uncontroverted fact that at the time when the appellant and the first

respondent went through the purported marriage ceremony in Las Vegas, the first respondent was still in marriage with one John Kung. This being the case, it is plainly obvious that the purported marriage ran counter the provision of s 5 of the Law Reform (Marriage and Divorce) Act 1976 which reads:

> Disability to contract marriage otherwise than under this Act
>
> 5 Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first mentioned marriage or the purported second marriage is contracted within Malaysia or outside Malaysia.

[10] It follows that under s 6 of the Act 'every marriage contracted in contravention of section 5 shall be void'. This is the position that the appellant is in with regard to his purported marriage to the first respondent. Having arrived at this finding, the next issue concerns the adoption of Jordan by the second and third respondents. This issue is common to both the appellant and the first respondent as they had sought a declaration that the said adoption is null and void and that the adoption and/or registration of the adoption be set aside. Learned counsel for the appellant contends that the adoption of Jordan by the second and third respondents pursuant to the Registration of Adoption Act 1952 ought to be declared null and void and set aside on the following grounds:

(a) the Act is not applicable to Muslims;

(b) lack of consent by biological parents;

(c) conditions under s 6 of the Act have not been fulfilled;

(d) conditions under s 6 of the Act have not been fulfilled/satisfied; and

(e) registration under the Registration of Adoption Act does not confer on the child full status of a child born to the adopters in lawful wedlock.

[11] To substantiate the first ground the court's attention is drawn to a High Court decision in *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618; [1999] 3 CLJ 539. The learned judge in that case took the approach that the Registration of Adoption Act 1952 should be read together with the Adoption Act 1952 which by virtue of s 31 is not applicable to Muslims. Hence, the trial judge decided that the registration is void.

[12] Relying on the above decision, learned counsel for the appellant contended that the second and third respondents being Muslims, the

purported registration of adoption of Jordan by the fourth and fifth respondents is, therefore null and void. A

[13] In the instant case, we had the advantage of scrutinising the grounds of judgment of the learned judicial commissioner and it is noted that she had carried out somewhat minute examination of both the Registration of Adoption Act and the Adoption Act. Following that exercise, she made her findings, inter alia, as follows: B

> In determining this issue, an examination of the contents of Act 253 and that of the Adoption Act 1952 (Act 257) therefore becomes necessary. The preambles of both Acts do not offer much assistance in that Act 253 merely says that it is 'An Act to provide for the registration of adoptions' whilst that of Act 257 states that it is 'an Act to provide for the adoption of children'. By merely looking at the titles of the Acts, it would not be difficult to come to a misleading conclusion that one can apply for an adoption order under Act 257 and then register the adoption order under Act 253. However, a reading of the relevant sections in the Acts will clearly show that it is not so. To start with, s 6 of Act 253 provides as follows: C D
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> 6 Registration of de facto adoptions
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> (1) Where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any de facto adoption, and has for a period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated, the Registrar may, upon the application, in the form in the First Schedule, of such person or spouses, register the adoption if — E F
>
> (a) such person or spouses and the child shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may satisfy the Registrar that such adoption took place; G
>
> (b) the parents or one of the parents, or, if both the parents are dead or if neither of the parents is within West Malaysia, any guardian of the child shall appeal before the Registrar and express consent to the adoption; H
>
> Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration; and I
>
> (c) the prescribed fees are paid.
>
> (2) The Registrar shall register an adoption by entering the particulars thereof in the register.

It is therefore apparent that under Act 253, the power to register an adoption is vested with the Registrar of Adoption. In contrast, the power to make adoption orders under Act 257 is the court having jurisdiction to do so under the said Act. The equivalent section to that of s 6 in Act 253 would be s 8. It reads as follows:

> 8 Provision as to existing de facto adoptions
>
> Where at the date of the commencement of this Act any child is in the custody of, and is being brought up, maintained and educated by any person or by two spouses jointly as his, her or their own child under any de facto adoption, and has for a period of not less than two years before such commencement been in such custody, and has been so brought up, maintained and educated, the Court may, upon the application of such person or spouses and notwithstanding that the applicant is a male and the child a female, make an adoption order authorising him, her or them to adopt the child without requiring the consent of any parent or guardian of the child to be obtained, upon being satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child that no such consent should be required and that an adoption order should be made.

It is very clear, therefore, that a comparison between s 6 of Act 253 and s 8 of Act 257 seems to show that one could effect an adoption either by way of 'registration' under Act 253 or by way of a court order under Act 257. The reason for choosing one over the other is not clear, although one could argue that there is more strength in an order of court. This is more so because Act 257 very clearly and specifically spelt out that 'Upon an adoption order being made, all rights, duties, guardian or guardians of the adopted child; in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall rest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock ...'. The same provision is not found in Act 253.

Also, under Act 253, the registrar is requested to keep a register which is prescribed in the Second Schedule in the same Act. Act 257 by way of s 25 provides for what is known as the 'Adopted Children Register'.

In view of these differences in the two Acts, in my opinion, there is a basis to support the proposition that Act 253 and Act 257 should be read and interpreted quite independently of one another. My view is further fortified by the provision of s 10 of Act 253 which states that 'The Register shall not register any adoption in respect of any child who has been the subject of an adoption order made in accordance with the Adoption Act 1952 (Act 257)'. It seems to me, therefore, that this provision clearly separates the operation of Act 253 from that of Act 257.

Having said that, I am also of the view that a different approach be taken on the question of the applicability of Act 253 to Muslims. Whilst Act 257 is very clear in its non-applicability to Muslims by virtue of s 3 of the Act, the same is not

found in Act 253. Act 253 is silent on this. In my view, therefore, in the absence of an equivalent provision to that of s 3 in Act 257, and the fact that the operation of the two Acts is quite independent of one another, there is nothing to bar the application of Act 253 to persons professing the religion of Islam. It was, in fact, brought to my attention by learned federal counsel for the fourth and the fifth defendants of a passage in *Halsbury's Laws of Malaysia* (Vol 8) MLJ at p 58, wherein it was quoted:

It should be noted that the Registration of Adoption Act 1952 was intended for the use of Muslims. This is because Islam does not recognise adoption and in order to legitimate such customary practice, the adoption could be registered under this Act so as to safeguard the right to custody of the adopted parents.

This statement is not without merits. Without proper documentation, how else then can a Muslim couple who has taken upon themselves the care of a child go about doing simple, routine things such as enrolling the said child into a school, or for the purpose of obtaining identity cards or even applying for passports?

I, therefore, hold that the contention of learned counsel for the plaintiff on this ground is without merits.

[14] We agree with the learned JC for the reasons given by her that Act 253 also applies to Muslims. We would go a step further to hold that *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* was wrongly decided. The learned judge in that case said that Act 253 is silent as to whether it applies to Muslims and after quoting s 31 of Act 257 which excludes its application to Muslims states:

The reason why Muslims are excluded from the operation of the Adoption Act 1952 (Act 257) is obvious. The effect of adoption under the Act is repugnant to Islamic law. I need not elaborate on this.

I am of the view that the two Acts should be read together otherwise the purpose for excluding Muslims from the operation of the Adoption Act 1952 is defeated.

[15] Whilst the effect of an adoption as stipulated under s 9 of Act 257 is repugnant to Islamic law, such or similar provision is not found in Act 253. Act 253 merely lends legal recognition to the de facto status of the adoptive parent having custody and being responsible for the care, maintenance, and welfare of the adopted child. The fact that both Acts were passed at about the same time in 1952 with only Act 257 providing for the exclusion of Muslims reflects the true intention of the Legislature not to bar the application of Act 253 to Muslims. The two legislation must be read independently as s 10(4) of Act 253 specifically bars the registration thereunder of any adoption under Act 257. The view expressed in *Halsbury's Laws of Malaysia* Vol 8 that Act 253 was intended for the use of Muslims is not without basis. The decision of the High Court on the point of law in *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* is therefore overruled.

[16] We now move on to another issue raised by the applicant in grounding his appeal. It concerns the requirement for consent under s 6 of the Registration of Adoption Act. Learned counsel for the appellant argued that the facts and the evidence shows that the first respondent did not give up Jordan for adoption and she had denied signing a statutory declaration for consent to adoption.

[17] In this regard, it is noted that the judicial commissioner had made a finding of facts out of the testimony of the first respondent in the following terms:

> Having perused through the evidence of the first defendant, I have to say that I had found little or no weight to be attached to it. Truthfully, I find it very difficult to accept the first defendant as a witness of truth, especially in the light of other evidence as to her conduct. In particular there is the evidence that she had not informed the plaintiff of her still subsisting marriage to John Kung Sie Kiat when they were married in Las Vegas. The plaintiff also told the story of how he flew to London on 23 March 2000 to surprise the first defendant because the first defendant had called to inform that she had given birth to their son in London when in fact, she had been in Kuala Lumpur the whole time. Then there is also the unchallenged evidence that whilst continuing that 'marriage' with the plaintiff, the first defendant was also living with Bart in Kuala Lumpur together with William and Jordan. Last but not least, there is also the issue of the falsification of information in Jordan's birth certificate which the first defendant had admitted doing. Taking these facts into account I am of the view that it would be very dangerous for me to accept her averments that she had not given her consent to the adoption. What reason can the second and the third defendants have to say that the first defendant had given her consent when in fact she has not. Based on these findings, I find that the first defendant's averments that she, in fact, did not give her consent to the adoption of Jordan to the second and third defendants very difficult to believe.

[18] In addition to the aforesaid learned counsel's argument respecting consent, it is contended that the appellant as the natural father was never asked for his consent. In this regard, it is uncontroverted facts that in the original birth certificate of Jordan, Bart Van Hoek had been named as the father of the child. This fact was also found in the Permohonan Pendaftaran Pengangkatan. Then, the Surat Keizinan Pengangkatan was found to state that Bart Van Hoek could not be contacted. Apparently, it was based on the aforesaid information that the fourth and fifth respondents proceeded to process and approved the application for registration of the adoption.

[19] In any event, the registrar of adoption in exercising his duties and powers with regard to application for registration of adoption is vested with discretion under s 6(1)(b) in the following terms:

> Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent, or custodian who shall have signified his consent by statutory declaration;

[20] On the facts of this case, we are of the view that the registrar in approving the registration of the adoption in question had exercised his discretion appropriately; after all s 8 of the Act in no uncertain terms imposed legal duty on parties and witnesses in the application to speak the truth. In the absence of any evidence to the contrary, the registrar is expected to accept and receive evidence of any witnesses supporting such application as statement of truth and thus become duty bound to register an adoption by entering the particulars thereof in the register.

[21] Having arrived at the aforesaid finding it should logically follow that all the prayers except for prayer (a) asked for by the appellant in his application before the High Court below are unsustainable, as granting of those orders, in our view would not be in the best interest of the child concerned. In this regard we quote a passage from the decision of Lindley LJ in *In Re McGrath* [1893] 1 Ch 143, which states:

> The duty of the court is, in our judgment, to leave the child alone, unless he is satisfied that it is for the welfare of the child that some other course shall be taken. The dominant matter for consideration of the court, is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded ... The court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child.

[22] Here, in the instant case, we have credible evidence to show that the child in question had been in the custody and care of the second and third respondents since the year 2000, not long after he was born. However, we also take note of the first respondent's claim that she had occasionally taken the child out from the second and third respondents custody. Nevertheless, the learned judicial commissioner in her judgment had made findings of facts that for all intent and purposes the child was, in fact, in the custody of the second and third respondents as the first respondent was seeing less and less of him. The judicial commissioner had also made a finding of facts that the second and third respondents were in good position to provide well for the child. At the same time, we are also conscious of the fact that the second and third respondents being Muslims themselves must have brought up the child in Islamic way. Thus, it is our view that the child who is now about ten years

of age is comfortably lodged in the custody and care of his aunt (the second respondent) and her husband, and it would not be in the best interest and welfare of the child to dislodge him and place him in the care and custody of the appellant who is virtually a stranger to him.

[23] For all the aforesaid reasons we dismissed the appeal with an additional order that the granting of prayer (b) by the judicial commissioner be set aside.

Appeal dismissed.

Reported by Kanesh Sundrum